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No. _____

In The

Supreme Court of the United States

October Term, 1984

MOSE HOLLAND,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

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April, 1985

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(11499)

Petitioner, MOSE HOLLAND, seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on February 8, 1895.

QUESTION PRESENTED

Did the warrantless, non-consensual arrest of the Petitioner, made under non-exigent circumstances, and when Petitioner was summoned by law enforcement agents to the hallway of his two-unit, private residence, violate his right to be free from unreasonable search and seizure as guaranteed him by the Fourth Amendment to the United States Constitution?

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are the United States of America and Mose Holland, the defendant below.

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OPINIONS BELOW

The opinions of the Court of Appeals and the United States District Court for the Western District are not yet reported and both appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on February 8, 1985 and this petition for certiorari was filed within sixty (60) days of that date. The Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

1. The Fourth Amendment, United States Constitution, which provides:

> The right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

2. The Statute under which Petitioner is being prosecuted is 21 U.S.C. §841(a)(1), which provides:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —
>
> > (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

STATEMENT OF THE CASE

The facts of this case are not in dispute. The Petitioner, Mose Holland, has been charged with a violation of 21 U.S.C. §841(a)(1). His motion to suppress statements which he allegedly made to Government agents and items of physical evidence taken from his home and person was granted by the United States District Court for the Western District. That order was reversed by a divided Court of Appeals for the Second Circuit in a judgment entered on February 8, 1985.

The gist of this case lies in the determination of whether the Petitioner was subject to an unlawful, warrantless arrest within his *home* as per *Payton v. New York*, 445 U.S. 573 (1980). In this instance, the home was a two-unit private residence occupied by

Holland and a second tenant (A-2).* Holland lived in the second floor apartment and both apartments were secured from the public by a locked outer door (A-23) which each tenant could open in response to a knock or doorbell ring (A-3). The question presented here centers around whether this area behind the locked outer door requires a warrant for lawful entry.

The impetus for entry into Holland's home occurred on February 4, 1983 when officers of the Drug Enforcement Administration and their Task Force met to conduct surveillance of Holland's co-defendant, Jerry Brown and to purchase cocaine from him through the use of an undercover, confidential informant. The agents tracked Brown as he left the informant's home and proceeded to Holland's residence at 137 Arden Lane. Brown returned to the informant's home, allegedly to consummate the drug sale and it was there that he was arrested. Deciding to cooperate with the police, Brown advised them that he had received the cocaine from one "Doc" who lived in the upstairs apartment of the Arden Lane address.

The information received from Brown was radioed by DEA agents to Deputy Sheriff Robinson, a member of the Task Force. Robinson was dispatched to the Arden address which he was told to "secure," detaining whomever was there pending issuance of a search warrant.

Robinson, armed and followed by two other armed officers, arrived at the residence at approximately 2:30 pm and rang the bell (located next to a locked outer door) to the upstairs apartment (A-3). Responding, Mose Holland proceeded downstairs and looked out of the window. Upon recognizing Robinson (the two belong to the same motorcycle club) Holland opened the locked outer door (A-3) and said, "Hey, Stick, how you doing?" (A-16). Displaying

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* Numbers in parentheses preceded by "A" refer to the Appendix to this Petition.

his badge and with gun drawn, Robinson replied: "Doc, this is business," (A-3). Holland then said: "After I opened the door, I knew something was wrong because you don't visit me" (75).*

Deputy Sheriff Robinson then entered the dwelling house and gave Holland his *Miranda* warnings as the two men proceeded upstairs (A-16). There is no dispute between the Government and the Petitioner that Holland was under arrest once Robinson entered the inner sanctum of the residence, a conclusion concurred in by both the District Court and the Court of Appeals (A-3, A-17). Likewise, all agree that this warrantless arrest was not made under exigent circumstances (A-3, A-22).

Once inside, Holland was advised that he would be detained until a search warrant to secure the premises could be issued. In response to questioning from Robinson, Holland stated that he had $3,000.00 and a half ounce in his pocket. Approximately three and one-half hours later, the search warrant was secured and the plastic bag containing white powder and some $3,000.00 in cash were recovered from the defendant's pockets.

Based on these facts, the United States District Court for the Western District of New York granted defendant Holland's motion to suppress upon its February 6, 1984 finding that the warrantless arrest had occurred within Holland's home and was thus made in derogation of his right to be free from unreasonable search and seizure. That finding was reversed by order of the United States Court of Appeals for the Second Circuit.

The jurisdiction of the United States District Court is founded upon 18 U.S.C. §3231.

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* Numbers in parentheses refer to pages in the record below.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW LEAVES OPEN SIGNIFICANT QUESTIONS OF LAW UNANSWERED BY *PAYTON V. NEW YORK*, 445 U.S. 573 (1980) AND WHICH HAVE RESULTED IN CONFLICTING OPINIONS AMONG THE CIRCUIT COURTS OF APPEALS.

In *Payton v. New York*, 445 U.S. 573 (1980), the Court held that absent carefully defined exigent circumstances, the Fourth Amendment prohibits police from making a warrantless, nonconsensual entry into a suspect's home in order to effect an arrest. In so deciding, the Court reaffirmed the notion of the sanctity of the individual's home (*Boyd v. United States*, 116 U.S. 616 (1886)), and cited with approval the reasoning of the Second Circuit Court of Appeals in *United States v. Reed*, 572 F.2d 412 (2d Cir.) *cert. denied sub nom. Goldsmith v. United States*, 439 U.S. 913 (1978), finding that the individual's right to privacy in his home was simply too important to permit its invasion without the safeguard of a warrant.

While *Payton* answers one significant question, one of equal import remains open and is squarely presented to the Court in the instant case; namely, how is the home to be defined and its boundaries described? In a two-family private residence which shares a common hallway guarded by a locked door, does the nonconsensual, warrantless entry of the police into that hallway to effect the defendant's arrest, constitute an intrusion into the home?

In reversing the determination of the District Court, the Second Circuit ruled that Holland had not been arrested in his home since, as to the hallway, he had no more than a customary ease-

ment of way in that area which was shared by the first floor tenant (A-2). Relying on its interpretation of *Payton*, the Court ruled:

> "The expectation of privacy against warrantless felony arrests thus has reference to a place . . . and will be violated only if the place is one that the defendant has the right to keep private and subject to his *exclusive control.*" (A-5, emphasis supplied).

Petitioner submits that that ruling is erroneous and at odds with the letter and spirit of the decisions of this Court and that, in any case, the question of the perimeters of the residence for Fourth Amendment purposes is ripe for review. The issue presented, or a comparable variant, has been ruled upon by a majority of the Circuit Courts of Appeals but no clear consensus of opinion has emerged, particularly after this Court's decision in *Katz v. United States*, 389 U.S. 347 (1967).

Petitioner submits first, that the reasoning of the Second Circuit was incorrect, founded as it is upon an archaic notion of property analysis which does not survive *Katz v. United States*, *Id.* Katz remains the "touchstone" of Fourth Amendment analysis (*Oliver v. United States*, ____U.S.____ , 104 S.Ct. 1735, 1740 (1984)), and not the least of its import lies in its overruling of *Olmstead v. United States*, 277 U.S. 438 (1928) and *Goldman v. United States*, 316 U.S. 129 (1942), which equated a violation of the Fourth Amendment with a physical trespass onto property. Inflexible concepts of property law no longer serve to determine the reach of the Fourth Amendment. Thus, whether or not Mose Holland had *exclusive* control of the hallway/vestibule area does not answer the more apropos questions of what "actual (subjective) expectation of privacy" the person has in the place and whether that expectation is "one that society is prepared to recognize as 'reasonable' " (*Katz v. United States*, *supra*, concurring opinion of Harlan, J. at 361). After all, it is no longer open to dispute that the Fourth Amendment protects people, not places.

This less restrictive analysis requires a review of factors beyond the right to exclude others. These might include the individual's expectation, the precautions he took to maintain his privacy, the validity of his being on the premises and the possessory interest he has in those premises. *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980).

The divergence of opinion regarding the correct analysis of a defendant's expectation of privacy in an area over which he may not have exclusive control is reflected even in the Second Circuit's opinion below. In his dissent, Judge Jon O. Newman wrote that Holland's right to be free from an unreasonable seizure had been violated given the nature of the place where the arrest occurred and the manner in which the defendant was using it (A-11). Because no one could enter Holland's apartment without passing through the hallway, Judge Newman felt it to be "intimately associated" with Holland's home in a way that the hallway of a multi-unit apartment building would not be. As to the manner in which the hallway was used by Holland, the dissent found it significant that Holland had viewed the outside door as the door to his home, unlocking it only when able to identify his visitor as someone whom he wished to admit (A-11, 12).

Just as Judge Newman's analysis stands in sharp conflict with the majority's approach to resolution of the issue, so, too, do the lower courts appear to be divided, having received no clear guidance from this Court.

As mentioned, the Second Circuit Court of Appeals continues to define the gravamen of the issue as being one of exclusive control over the place of arrest (see, e.g. *United States v. Arboleda*, 633 F.2d 985 (2d Cir. 1980) *cert. denied* 450 U.S. 917 (1981)). Indeed, that Court has explicitly ruled that the Supreme Court's analysis in *Katz* does not undercut the merits of earlier Second Circuit decisions finding no reasonable expectation of privacy in

commonly shared hallways. *United States v. Penco*, 612 F.2d 19, 24-25 (2d Cir. 1979).

Other courts, however, have taken less narrow an approach. In *United States v. Carriger*, 541 F.2d 545 (6th Cir. 1976), a federal agent gained entry to a locked, 12 unit apartment building and observed the appellant in the third floor hallway, conducting an apparent drug transaction. The defendant was then arrested in his apartment.

In reversing the conviction, the Sixth Circuit held, in reliance upon *Katz*, that a tenant in an apartment building does have a reasonable expectation of privacy in those common areas of the building not open to the general public. The Court opined that while a tenant may expect other tenants and invited guests to enter the common areas of the building, he has a justifiable expectation that the uninvited will not so intrude (*Id.* at 551).

Consistent with that reasoning is the Fifth Circuit's opinion in *Fixel v. Wainwright*, 492 F.2d 480 (5th Cir. 1974). The Court considered whether or not the defendant had a cognizable right to privacy in the backyard of a four-unit apartment building. Heeding the Government's argument that the backyard is an area shared with other tenants, the Court nevertheless concluded:

> "While the enjoyment of his backyard is not as exclusive as the backyard of a purely private residence, this area is not as public or shared as the corridors, yards or other common areas of a large apartment complex or motel" (*Id.* at 484).

The Fifth Circuit is not alone in assessing a Fourth Amendment entitlement by reference to the nature of the area and the use to which it is put, thereby drawing some distinction between the small common area shared by a few and a vast number of shared areas in a large apartment complex. The same approach was taken in *United States v. Fluker*, 543 F.2d 709 (9th Cir. 1976) cited by Judge Newman in his dissent below.

The facts of *Fluker* are noticeably akin to those at bar. The entrance way at issue was a common doorway leading to a small corridor shared by the two basement tenants, one of whom was the defendant. The landlord resided upstairs. The doorway was ordinarily kept locked and only the tenants and landlord had keys (*Id.* at 712).

In considering whether a drug agent's forceable entry through a locked outer doorway violated a statute prohibiting the same, the Court initially noted that the premises was not a multi-unit building and:

> "The two lower-level tenants thus exercised considerably more control over access to that portion of the building than would be true in a multi-unit complex, and hence could reasonably be said to have a greater reasonable expectation of privacy than would be true of occupants of large apartment buildings" (*Id.* at 716). (See also *United States v. Case*, 435 F.2d 766 (7th Cir. 1970)).

That view is not universally held, other circuits agreeing with the Second that exclusivity of control is the outstanding criterion by which the expectation of privacy is to be measured. In *United States v. Eisler*, 567 F.2d 814 (8th Cir. 1977), the Court of Appeals for the Eighth Circuit held that the hallway of an apartment complex was not a domain recognized under the Fourth Amendment since the right to privacy implies an expectation that the individual will be free from any intrusion, not merely that which is unwarranted (*Id.* at 816). In *United States v. Anderson*, 533 F.2d 1210, 1214 (D.C. Cir. 1976), it was held that no constitutionally protected expectation of privacy inhered in the corridors of a rooming house shared by all who had a legitimate reason to be on the premises. See also *United States v. Acevedo*, 627 F.2d 68, 69 fn. 1 (7th Cir. 1980) *cert. denied* 449 U.S. 1021 (1980); *United States v. Cruz Pagan*, 537 F.2d 554, 558 (lst Cir. 1976).

While this potpourri of opinion certainly attests to the varieties of analysis possible even with a much less decided emphasis on common law property concepts, resolution and guidance become all the more vital with the Court's pronouncement in *Payton*. Moreover, various of the Court's other recent Fourth Amendment decisions downplaying the nature of the *place* in favor of analysis of the individual's actual expectation and the reasonableness of that expectation, serve even further to emphasize the need for clarification.

That an individual should not be accorded a lesser degree of constitutional protection because of his type of residence was a factor of note to dissenting Judge Newman. Judge Newman deplored the fact that had Holland lived in a modern apartment house with a buzzer and speaker mechanism, he would have been able to admit Deputy Robinson to his apartment without ever leaving its confines and thereby jeopardizing his constitutional rights (A-8). Similarly, Petitioner submits that were he able to afford the luxury of a private residence, his constitutionally protected right to privacy would have remained intact:

> "The interest in privacy has the same dignity in a densely populated apartment complex, cf. *Payton v. New York* . . . or in an affluent neighborhood of single-family homes" *City of Memphis v. Greene*, 451 U.S. 100, 127 (1981).

The Fourth Amendment's protection should not hinge on these amorphous distinctions any more than on those baseless and now judicially condemned distinctions between searches of luggage and searches of "less worthy" containers. As the Court explained in *United States v. Ross*, 456 U.S. 798 (1982):

> "For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion, so also may a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim an equal right to conceal his possessions from of-

ficial inspection as the sophisticated executive with a locked attache case" (*Id.* at 822).

That a man's home is his castle is an incontrovertible aphorism which has taken on renewed importance in the wake of *Payton v. New York*. Petitioner submits that the time is opportune for this Court to clarify just what the boundaries of that castle might be for purposes of Fourth Amendment review.

II

THE DECISION BELOW GIVES NO RECOGNITION TO THE CURTILAGE DOCTRINE WHICH MAY BE APPLICABLE TO THE FACTS OF THIS CASE.

In *Fixel v. Wainwright*, 492 F.2d 480 (5th Cir. 1974), the Court noted that the petitioner therein had a justifiable expectation of privacy in his backyard (although shared by three other tenants) and in so holding, relied on the common law concept of curtilage, that area immediately surrounding the house and to which the protection of the Fourth Amendment also extends (*Id.* at 483). (See also *United States v. Blank*, 251 F.Supp. 166, 171-172 (N.D.Ohio 1966) common hallway protected under curtilage doctrine).

The curtilage doctrine, while historically recognized by this Court, received a fresh salvo of approval in *Oliver v. United States*, ____U.S.____ , 104 S.Ct. 1735 (1984), erasing any remaining doubts as to its vitality in the wake of *Katz v. United States*, 389 U.S. 347 (1967). See, e.g. *Wattenburg v. United States*, 388 F.2d 853, 857 (9th Cir. 1968). The curtilage definition was reiterated as being the "area to which extends the intimate activity associated with the 'sanctity of a man's home and the pri-

vacies of life' " (*Oliver, supra*, at ____U.S.____ , 104 S. Ct. 1742, quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

If, in a two unit apartment, the home is only the apartment proper, it is reasonable to assume that at least that area immediately adjacent to the home will remain private (*Oliver v. United States, Id.*, at ____U.S.____ , 104 S.Ct. 1742). In this case, that area might be expected to include the common hallway and vestibule where Holland could reasonably expect to engage in activities connected with his home, free from the intrusive eye of the uninvited.

Certainly, the record substantiates the actual expectation of privacy the Petitioner presumed to be his. For instance, when Holland left his apartment proper to answer the bell, he left his upstairs door open (78), signifying his belief that the outer, locked door stood between him and intruders (see *United States v. Fluker*, 543 F.2d 709, 716 (9th Cir. 1976). Holland released the outside entrance lock only upon recognizing his friend, Deputy Robinson.

Holland's own actions in keeping the vestibule door locked while allowing the inner door to remain open evidence that the area which he attempted to shield from public intrusion included the hallway, shared though it was with one other tenant. Moreover, his actual subjective expectation of privacy is validated by the fact that intrusion into the area in question violates a predominant societal value, the sanctity of the home and its immediate environs (*Oliver v. United States, supra*, at ____U.S.____ , 104 S.Ct. 1743).

With the renewed interest afforded the curtilage doctrine subsequent to the decision in *Oliver v. United States*, petitioner appropriately seeks amplification of that doctrine and its potential applicability to facts such as those found on this record.

CONCLUSION

For these reasons, the writ of certiorari should be granted.

Respectfully submitted,

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April, 1985

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Cal. No. 1360 — August Term, 1983

(Argued: June 13, 1984 Decided: February 8, 1985)

Docket No. 84-1088

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

—v.—

MOSE HOLLAND,
Defendant-Appellee.

Before:

FRIENDLY, VAN GRAAFEILAND, and NEWMAN,
Circuit Judges.

Appeal from an order of the United States District Court for the Western District of New York (Elfvin, J.) granting defendant's motion to suppress evidence.

Reversed.

FRANK J. CLARK, III, Ass't U.S. Att'y., Buffalo, N.Y. (Salvatore R. Martoche, U.S. Att'y., Buffalo, N.Y., on the brief), *for Plaintiff-Appellant.*

PAUL J. CAMBRIA, JR., Buffalo, N.Y. (Rochelle A. Reback, Lipsitz, Green, Fahringer, Roll, Schuller & James, Buffalo, N.Y., on the brief), *for Defendant-Appellee.*

VAN GRAAFEILAND, *Circuit Judge:*

This is an appeal by the Government from an order of the United States District Court for the Western District of New York (Elfvin, J.) suppressing certain evidence and oral admissions which followed appellee's warrantless arrest. Although the district court found that the arrest was based on probable cause, thus satisfying the requirement of *United States* v. *Watson*, 423 U.S. 411 (1976), it held the arrest to be illegal under *Payton* v. *New York*, 445 U.S. 573 (1980), because appellee was "inside his home" when the arrest took place. Disagreeing with this conclusion, we reverse.

Appellee is the tenant in the second floor apartment of a two-story house in Buffalo. Entry to the apartment is by means of a common hallway, which also serves the first floor apartment. It is not contended that appellee had any more than the customary easement of way in the common hallway, an easement which gave the occupants of the upstairs and downstairs apartments and their visitors the right to use the hallway. *See Presby* v. *Benjamin*, 169 N.Y. 377, 379 (1902); *Federal Waste Paper Corp.* v. *Garment Center Capitol, Inc.*, 268 A.D. 230, 233-34 (1st Dep't 1944), *aff'd*, 294 N.Y. 714 (1945); *Swain* v. *Mizner*, 74 Mass. 182 (1857).

On February 4, 1983, Deputy Sheriff James Robinson, who was participating with other officers in a drug

bust, rang the bell for appellee's apartment at the ground floor entranceway to the common hallway. Appellee and Robinson were friends, or at least acquaintances, and appellee knew that Robinson was a police officer. When Robinson rang the bell, appellee left his second floor apartment, walked down a flight of stairs to the first floor, then down another flight of stairs to a hallway or vestibule leading to the outer door. Recognizing Robinson, he opened the door to him. The district court found that appellee was not induced to open the door as the result of police deception or coercion.

When the door was opened, Robinson drew his gun, displayed his badge and said, "Doc, this is business." From that time on, appellee's liberty of movement was restricted, and he could not reasonably have believed that he was free to leave. He was under arrest. *See United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980); *Henry* v. *United States*, 361 U.S. 98, 103 (1959); *United States* v. *Thompson*, 356 F.2d 216, 222 (2d Cir. 1965), *cert. denied*, 384 U.S. 964 (1966). The Government contends that the arrest was lawful, because appellee then "was as exposed to public view, speech, hearing, and touch as if [he] had been standing completely outside [his] house." *United States* v. *Santana*, 427 U.S. 38, 42 (1976); *see United States* v. *Whitten*, 706 F.2d 1000, 1015 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1593 (1984); *United States* v. *Mason*, 661 F.2d 45, 47 (5th Cir. 1981). We see no need, however, to treat this as a "threshold" case. Assuming that appellee's arrest took place in the vestibule or hallway, it nevertheless did not take place in appellee's "home".

Although the Supreme Court has accorded apartments and hotel rooms status as "homes" for Fourth

Amendment purposes, it has never given the same status to adjoining common hallways. For example, in *Miller* v. *United States*, 357 U.S. 301 (1958), where police officers forced their way into the defendant's basement apartment, the Court said that they "broke the door to invade his home." *Id.* at 314. In *Johnson* v. *United States*, 333 U.S. 10 (1948), where Johnson was arrested in her hotel room, the Court described the "[e]ntry to defendant's living quarters" as the beginning of the search. *Id.* at 13. In *Ker* v. *California*, 374 U.S. 23 (1963), Justice Brennan, one of the staunchest advocates of Fourth Amendment restraints, condemned only the "unannounced intrusion of the arresting officers into [petitioners'] apartment." *Id.* at 46 (Brennan, J., concurring in part and dissenting in part). In *United States* v. *Reed*, 572 F.2d 412 (2d Cir. 1978), where we announced this Court's disapproval of warrantless, non-exigent arrests inside a defendant's home—in that case, an apartment—we took special note of the fact that the arrest did not occur in the hallway. *Id.* at 423.

Congress, too, has recognized this common-sense distinction between places of abode, such as apartments, and common hallways. The short-lived National Prohibition Act, Pub. L. No. 46, 41 Stat. 305, 315 (1919), as supplemented by Pub. L. No. 96, 42 Stat. 222, 223 (1921), prohibited the warrantless search of a "private dwelling" and construed that term to include "the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house."

In *Katz* v. *United States*, 389 U.S. 347 (1967), Justice Stewart, writing for the majority, stated that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.'" *Id.* at 350. Justice

Harlan, concurring, said that the extent of Fourth Amendment protection generally is determined by reference to a place. *Id.* at 361. Consistent with this reasoning, the Court thereafter held that a suspect has no generalized right of privacy against a warrantless felony arrest based on probable cause, *United States* v. *Watson*, *supra*, 423 U.S. 411, but recognized the existence of a limited right of privacy against an arrest in the suspect's home, *Payton* v. *New York*, *supra*, 445 U.S. 573.

The expectation of privacy against warrantless felony arrests thus has reference to a place, *United States* v. *Agapito*, 620 F.2d 324 331 (2d Cir.), *cert. denied*, 449 U.S. 834 (1980), and will be violated only if the place is one that the defendant has the right to keep private and subject to his exclusive control. *See Rakas* v. *Illinois*, 439 U.S. 128, 149 (1978); *United States* v. *Eisler*, 567 F.2d 814, 816 (8th Cir. 1978); *United States* v. *Williams*, 565 F. Supp. 353, 361-62 & n.15 (N.D. Ill. 1983). Accordingly, it is the established law of this Circuit that the common halls and lobbies of multi-tenant buildings are not within an individual tenant's zone of privacy even though they are guarded by locked doors. *See, e.g., United States* v. *Martinez-Gonzalez*, 686 F.2d 93, 101-02 (2d Cir. 1982); *United States* v. *Arboleda*, 633 F.2d 985, 991-92 (2d Cir. 1980), *cert. denied*, 450 U.S. 917 (1981); *United States* v. *Penco*, 612 F.2d 19, 24-25 (2d Cir. 1979); *United States* v. *Corcione*, 592 F.2d 111, 118 (2d Cir.), *cert. denied*, 440 U.S. 975 (1979); *United States* v. *Wilkes*, 451 F.2d 938, 941 n.6 (2d Cir. 1971); *United States* v. *Llanes*, 398 F.2d 880, 883-84 (2d Cir. 1968), *cert. denied*, 393 U.S. 1032 (1969); *United States* v. *Conti*, 361 F.2d 153, 157 (2d Cir. 1966), *vacated on other grounds*, 390 U.S. 204 (1968); *United States* v. *Miguel*, 340 F.2d 812, 814 (2d Cir.), *cert. denied*, 382 U.S. 859

(1965); *United States* v. *Moore*, 463 F. Supp. 1266, 1270 (S.D.N.Y. 1979); *United States* v. *St. Clair*, 240 F. Supp. 338 (S.D.N.Y. 1965).

Moreover, we never have held that the common areas must be accessible to the public at large nor have we required a quantified amount of daily traffic through the area as a basis for determining that a common area is beyond an individual's protected zone of privacy. *See United States* v. *Corcione*, *supra* (hallway outside second-story apartment in two story, two-apartment house); *United States* v. *Arboleda*, *supra* (fire escape); *United States* v. *Wilkes*, *supra* (hallway outside ground floor apartment in New York City brownstone); *United States* v. *Llanes*, *supra* (hallway outside rear ground floor apartment). *See also Polk* v. *United States*, 314 F.2d 837 (9th Cir. 1963) (per curiam) (outside stairway serving first and second floor flats), *cert. denied*, 375 U.S. 844 (1963).

This rule gives tenants the benefit of much-needed police protection in common hallways, *People* v. *Capone*, 35 Misc.2d 1071, 1074 (1962), while it preserves for them the privacy of their actual places of abode, their apartments. It also lays down a clearly-defined boundary line for constitutionally permissable police action, which is readily apparent to an officer in the field, without a need for counting apartments, analyzing common-hallway traffic patterns or interpreting the mental processes of a suspect relating to an area used in common with others. In addition to protecting the public against the untoward effect of a "constable's blunder," it protects the "constable" against potential civil liability under 42 U.S.C. § 1983 resulting from an erroneous determination as to whether the door to a tenant's "home" is his apartment door or a door at the other end of a common hallway.

See Segura v. *United States*, 52 U.S.L.W. 5128, 5132 (July 5, 1984). We see no reason why the rule should not be applied in the instant case.

In passing along the common ways in his building on any given day, including the day of his arrest, appellee reasonably might expect to meet the landlord or his agents, the occupants of the first floor apartment, deliverymen, tradesmen, or one or more visitors to the first floor apartment. *See United States* v. *Eisler*, *supra*, 567 F.2d at 816; *United States* v. *Anderson*, 533 F.2d 1210, 1214 (D.C. Cir. 1976). He had no right to exclude them from the common hallway, and there is no indication that he ever tried to do so. In *United States* v. *Penco*, *supra*, 612 F.2d at 25, where, as here, the defendant's argument was based upon *Katz* v. *United States*, *supra*, 389 U.S. 347, we said:

> The argument that the privacy expectations analysis of *Katz* v. *United States*, 389 U.S. 347 (1967), somehow undercut the reasoning of [*United States* v. *Miguel*, *supra*] and [*United States* v. *Conti*, *supra*] was expressly considered and rejected by our Court in *United States* v. *Llanes*, 398 F.2d 880 (2 Cir. 1968), *cert. denied*, 393 U.S. 1032 (1969).

Prior to *Payton* v. *New York*, *supra*, 445 U.S. 573, the Supreme Court never had clearly established whether a warrant was needed for the non-exigent felony arrest of a person inside his home. *Id.* at 574. With three justices vigorously dissenting, the Court answered the "narrow question", *id.* at 582, in the affirmative. Justice Stevens, writing for the majority, said:

> We . . . hold that the Fourth Amendment . . . prohibits the police from making a warrantless and

> nonconsensual entry into a suspect's home in order to make a routine felony arrest.

Id. at 576.

We believe that, when the *Payton* majority said they were answering a "narrow question", they meant exactly that. Reading *Payton* in the light of the "question's" controversial history, we find no intent to broaden the definition of "home" so as to include, as here, the entranceway to a common hallway.

The order of the district court is reversed.

JON O. NEWMAN, *Circuit Judge*, dissenting:

Mose Holland was in his second-floor apartment in a two-family house when he heard someone ring the bell to his apartment. He walked down two flights of stairs, looked out the window in the outside door, recognized his friend, Deputy Sheriff Robinson, and opened the door. Robinson then displayed a gun and a badge, said "Doc, this is business," and arrested Holland without a warrant just inside the door.[1] If Holland had been living in a modern building equipped with a buzzer mechanism for unlocking the outside door and a means of communication between apartment and entrance, he would have ascertained his visitor's identity by recognition of his voice instead of his face, buzzed to admit the officer through the outside door, and waited in his apartment until the officer climbed the two flights of stairs and knocked on his apartment door. If Holland had then opened that door

[1] The Government makes no claim that exigent circumstances justified a warrantless entry or that Holland consented to that entry.

and seen Robinson with gun and badge, his arrest just inside his apartment door would have violated the Fourth Amendment. *Payton* v. *New York*, 445 U.S. 573 (1980); *United States* v. *Reed*, 572 F.2d 412 (2d Cir.), *cert. denied*, 439 U.S. 913 (1978). The majority concludes that on the facts of this case no Fourth Amendment violation occurred because Holland, in the course of admitting his visitor to his home in the only way available to him, was arrested in a "common hallway"—the vestibule just inside the outside door. I respectfully dissent because I do not believe the Fourth Amendment protection available to those admitting visitors to their apartment homes in a modern building is lost in the humble surroundings in which Mose Holland lives.

My difference with the majority stems from a fundamental disagreement as to the proper approach in determining the scope of Fourth Amendment protection. Employing essentially property concepts, the majority notes that Holland had no more than "the customary easement of way" in the vestibule. His lack of exclusive rights in any part of the premises other than the confines of his apartment results in his loss of Fourth Amendment protection against a warrantless arrest in his "home." In my view, reliance on property concepts, which formerly served to explain why a listening device placed *against* a wall was lawful, *Goldman* v. *United States*, 316 U.S. 129 (1942), while a "spike mike" *penetrating* a wall was not, *Silverman* v. *United States*, 365 U.S. 505 (1961), has been displaced by *Katz* v. *United States*, 389 U.S. 347 (1967), in favor of an inquiry into reasonable expectations of privacy as the determinant of Fourth Amendment protection. *See United States* v. *Santana*, *supra*, 427 U.S. 38, 42 (1976).

In *Katz* v. *United States, supra,* the Supreme Court rejected the Government's warrantless overhearing of a suspect's end of telephone calls placed from a public telephone booth. The Court explained that its conclusion did not rest on a finding that the place where the seizure occurred was a "constitutionally protected area." *Id.* a 351. Rather the Court determined that under the circumstances there had been an intrusion on the defendant's justifiable privacy interests. *Id.* at 353. In the majority's well-known phrase, "[T]he Fourth Amendment protects people, not places." *Id.* at 351. But, as Justice Harlan's concurring opinion helpfully explains, the determination of what privacy interests of people society is prepared to regard as reasonable often requires "reference to a 'place.' " *Id.* at 361. A person's expectation of privacy in his home will normally be considered reasonable, and his expectation of privacy in activities conducted "in the open" will usually be deemed unreasonable, though the inquiry cannot consider "place" apart from its use. For Justice Harlan, it was not decisive that the telephone booth was " 'accessible to the public' at other times." *Id.* By shutting the door to the booth and paying the toll to place his call, the defendant had entered a "temporarily private place" in which he was reasonably entitled to expect freedom from governmental intrusion. *Id.*[2] The lesson of *Katz* is that, before a place can be labeled "private" or "public" for purposes of determining the reasonableness of a person's expectation of privacy, it is necessary to consider both the nature of the place and the manner in which the person is using it.

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[2] The reasoning of Justice Harlan's concurrence has been widely followed. *See, e.g., Oliver* v. *United States,* 104 S. Ct. 1735, 1740 (1984); *Illinois* v. *Andreas,* 103 S. Ct. 3319, 3323 (1983); *United States* v. *Santana,* 427 U.S. 38, 42 (1976); *United States* v. *Reed,* 572 F.2d 412, 422 (2d Cir.), *cert. denied,* 439 U.S. 913 (1978).

The subsequent decisions in *United States* v. *Watson*, 423 U.S. 411 (1976), and *Payton* v. *New York*, *supra*, are entirely consistent with this approach. A warrantless arrest was upheld in *Watson* because it occurred in a public restaurant and no circumstances indicated any private use of the premises by the defendant. By contrast, a warrantless arrest was ruled unlawful in *Payton* because it occurred in a home and no circumstances indicated any public use of the premises. *See also Oliver* v. *United States*, 104 S. Ct. 1735, 1741-42 (1984); *United States* v. *Santana*, *supra*, 427 U.S. at 42. Holland was arrested in a common hallway of a two-family house. That hallway is not as public as the restaurant in *Watson*, nor as private as the interior of the home in *Payton*. To determine whether Holland had a reasonable expectation of privacy in that hallway at the time of his arrest, we should consider the nature of the "place" and the circumstances under which he was then using it.

Access to the hallway was extremely limited. For all that appears, the only persons who could gain access were those admitted with the consent of either Holland or the tenant of the first-floor apartment. Moreover, the hallway was an enclosed area, not exposed to public view, except for the brief moment when the door was opened to admit a visitor. Visitors, and even Holland himself, could not enter Holland's apartment without passing through the hallway. The hallway was closely, indeed "intimately," associated with Holland's home, *see Oliver* v. *United States*, *supra*, 104 S. Ct. at 1742, far more so than would be true of lobbies and hallways of apartment buildings with numerous apartments.

Most significantly, when Holland opened the outside door, he was using it as the door to his home. When he

heard the doorbell ring, he came down the stairs and looked out the window to identify his visitor, a "normal precaution[] to maintain his privacy," *Rawlings* v. *Kentucky*, 448 U.S. 98, 105 (1980). In fact, the only way Holland could admit Robinson to his home was to go downstairs, open the outside door, and escort his visitor through the hallway and up the stairs to his apartment. Holland is not asserting a privacy interest in the hallway apart from the use he was then making, for example, if he had left something in the hallway. The facts establish a location that was sufficiently related to a home and that was being used in a sufficiently direct connection with access to a home to demonstrate a reasonable expectation of privacy. *Cf. United States* v. *Fluker*, 543 F.2d 709, 716-17 (9th Cir. 1976) (tenant of basement apartment in three-apartment dwelling had reasonable expectation of privacy in area separating his apartment from outer door of building for purposes of applicability of 18 U.S.C. § 3109 (restricting forcible entry)).

The majority invokes several decisions of our Circuit for the proposition that common hallways of multi-tenant buildings are not within an individual tenant's zone of privacy. — F.2d at —. In none of those cases, however, did the law enforcement agent gain access to the hallway by virtue of the defendant's response to the agent's display of authority. The agent got in because the building door was unlocked, *United States* v. *Wilkes*, 451 F.2d 938, 940 (2d Cir. 1971), or because a building employee let him in, *United States* v. *Penco*, 612 F.2d 19, 21 (2d Cir. 1979), or because another tenant let him in, *United States* v. *Corcione*, 592 F.2d 111, 114 (2d Cir.), *cert. denied*, 440 U.S. 975 (1979), or because another tenant was coming out, *United States* v. *Miguel*, 340 F.2d 812, 814 (2d Cir.), *cert. denied*, 382 U.S. 859 (1965). I have no doubt that

a tenant in a multi-apartment building must accept the risk that someone else will admit a police officer into the common areas of the building and, if the defendant is present in those areas, he may be arrested there upon probable cause. But following *Katz* (temporally and substantively), I believe a tenant has a legitimate expectation of privacy in a hallway when he is using it to admit someone to his home; at least, this should be so in a small two-family house like Holland's.

I appreciate the majority's preference for a "clearly-defined boundary line" that will be readily apparent to an officer in the field. However, that line already exists for cases such as this: the line between arrests with a warrant and those without a warrant. Sheriff Robinson, or any other law enforcement officer sent to arrest a suspect in his home under non-exigent circumstances, can always satisfy the requirements of *Payton* by presenting evidence of probable cause to a neutral magistrate and obtaining a warrant. Armed with a warrant, Robinson could lawfully have arrested Holland in the hallway, and even a defect in the warrnt would not have barred the use of evidence thereby obtained. *United States* v. *Leon*, 104 S. Ct. 3405 (1984). We need not ignore the reality of the private use Holland was making of the vestibule when he answered Robinson's ring in order to give police officers a discernible line. The Fourth Amendment, by normally requiring warrants, has already done that.

It is especially distressing to see an officer's potential civil liability under 42 U.S.C. § 1983 (1982) relied upon as a reason for fashioning a needlessly restrictive rule that denies a tenant any protection against a warrantless arrest beyond the physical confines of his apartment. That constitutional tort action already has its

own objective good-faith immunity defense to protect the officer who ought not to be held in damages even though he may have transgressed a constitutional standard. *See O'Hagan* v. *Soto*, 725 F.2d 878, 879 (2d Cir. 1984). Difficulty in applying constitutional limits to the facts of a specific case may justify limiting an officer's exposure to damage liability by a defense of qualified immunity, but such difficulty ought never to be any part of the determination of the substantive content of the pertinent constitutional standard.

In the majority's view, when Mose Holland came downstairs and stood in the vestibule to answer Sheriff Robinson's ring, he was using a right of easement. In my view, he was admitting a visitor to his home. Because I find no case permitting a warrantless arrest in such circumstances and believe that a warrant was required under the principles of *Katz* and *Payton*, I dissent.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA CR-83-26E

-vs-

JERRY BROWN and
MOSE HOLLAND MEMORANDUM

This Memorandum supports my earlier Order in these premises.

In this prosecution under 21 U.S.C. 8841(a)(1) for alleged unlawful distribution and possession of the controlled substance cocaine, defendant Holland has moved to suppress certain statements allegedly made by him to government agents as well as certain items of physical evidence taken from his person and from his home by the Government.

The facts surrounding the instant motion are basically undisputed. On the morning of February 4, 1983 agents of the Drug Enforcement Administration ("the DEA") and police officers assigned to the DEA's Task Force met for the purpose of formulating an investigative plan regarding the source of co-defendant Brown's supply of cocaine. (Transcript of the Suppression Hearing, ["T"] 1-5 & 1-6). It was decided that two purchases of cocaine would be arranged that day by utilizing the assistance of a government informant and that surveillance units would track Brown's movements during the course of the day.

Thereafter agents twice followed Brown from the informant's residence at 71 Collins Walk, Buffalo, N.Y. to a two-family dwelling located at 137 Arden Lane in Buffalo (T 1-9 & 1-10). On the second occasion one of the agents exited his vehicle and was able to get close enough to Brown to overhear him tell someone that he

was "going upstairs" (T 1-11). When Brown returned to 71 Collins Walk at approximately 1:30 p.m. to consummate the second sale, he was placed under arrest by agents waiting inside (T 1-12). After being informed of his "*Miranda* rights" Brown was asked whether he wished to cooperate with the government. Brown indicated that he did and in response to Agent Burke's inquiry stated that he had obtained the cocaine from an individual by the name of "Doc" who lived in the upstairs apartment at the Arden Lane address. (T 1-12).

Shortly thereafter Deputy Sheriff Robinson received instructions from Agent Joura via the DEA radio to proceed to Arden Lane and to "secure" the premises. Robinson had been involved in the investigation and the earlier surveillance and understood that these directions required him to proceed to the dwelling and detain whoever was there (T 1-59 & 1-60). Robinson was aware that other officers had earlier seen Brown entering the Arden Lane premises, that Brown had been arrested at 71 Collins Walk and that Brown had stated to the agents that the seized cocaine had been obtained from a man named "Doc" in the upstairs Arden Lane apartment (T 1-60 to 1-63). Due to their common membership in a motorcycle club Robinson was acquainted with defendant, knew that he was referred to by the nickname "Doc" (T 1-61) and also knew that Holland lived at 137 Arden Lane (T 1-90).

At approximately 2:30 p.m. Robinson arrived at the side door at 137 Arden Lane and rang the upper bell. Defendant came downstairs, looked out the door's window and, upon seeing and recognizing Robinson, opened the door and stated, "Hey, Stick, how you doing?" (T 1-63). Robinson had his gun drawn at this point and, upon displaying his badge to defendant, stated "Doc, this is business" (T 1-63) and then entered the small hallway or vestibule leading to the two apartments where he gave defendant his *Miranda* rights. Although Robinson did not tell Holland that he was under arrest, it is clear from Robinson's testimony that

from this point in time Holland would not have been permitted to leave the premises, make or receive any phone calls, or be alone for even a moment in the apartment. Two government agents followed Robinson's entry into the house by approximately twenty seconds and they followed Robinson and Holland up to defendant's apartment where defendant was detained until approximately 6:00 p.m. when a search warrant had been secured and brought to the premises.

The parties are in agreement that Holland was under arrest from the time of the officers' warrantless entry into his home. Under the objective factors enumerated by the United States Supreme Court in *Dunaway v. New York*, 442 U.S. 200, 212-213 (1979), this conclusion by the parties is correct inasmuch as defendant was not free to leave (T-166) or communicate with other persons by telephone (T 1-118) and he remained under constant guard during the three and one-half hours of detention (T 1-104).

Defendant contends that Robinson lacked probable cause to arrest him and that in any event the warrantless arrest at defendant's home violated the mandate of *Payton v. New York*, 445 U.S. 573 (1980), prohibiting a warrantless and nonconsensual entry into a suspect's home to make a routine felony arrest absent exigent circumstances. Defendant therefore asserts that both the alleged admissions made by him following the unlawful arrest and the physical evidence seized from his person should be suppressed as evidence under the "fruits of the poisonous tree" doctrine.

The Government has argued that probable cause existed for Holland's arrest and that *Payton* is inapplicable inasmuch as defendant had been arrested at the doorway of the immediate hallway of the building in which defendant had his home or apartment and, furthermore, that the common hallway of an apartment building is not considered part of one's home entitled to the protections of *Payton* or the Fourth Amendment. I find unpersuasive both of the Government's arguments regarding the inapplicability of *Payton* to the facts of this case and therefore am

granting defendant's motion to suppress the statements and evidence obtained as a result of the arrest. As will be explained, defendant Holland was in fact arrested in his home according to the law in this circuit and the additional line of cases dealing with warrantless arrests in apartment building hallways or lobbies is inapposite to the instant circumstances.

Inasmuch as the Government has stated that it does not intend to offer at trial the additional evidence seized pursuant to the search warrant, it is unnecessary to decide the validity of such warrant. However it is noted in passing that the warrant is tainted by the inclusion in the attached affidavit by Agent Burke of the illegally obtained admission by defendant and that, in view of the absence of any other evidence establishing that defendant's home contained any contraband, the evidence obtained pursuant to such warrant would have inevitably been suppressed.

Initially I find that there was in fact probable cause to arrest Holland on the afternoon of February 4, 1983 and that, had the Government obtained an arrest warrant or had defendant been subdued outside of or as he had left his home, any evidence obtained pursuant to a custodial search or proper interrogation would have been admissible. Robinson possessed sufficient reliable information when defendant had opened the door to his home to lead a reasonable person to believe that Holland had committed the felony defined in 21 U.S.C. §841(a)(1) of distributing cocaine to Brown. The statement of Brown, corroborated by the surveillance observations concerning Brown throughout the day and particularly at Arden Lane (all of which had been conveyed to Robinson), when combined with Robinson's personal knowledge regarding defendant's nickname and place of residence served to provide probable cause to arrest Holland. *Cf. United States v. Agapito*, 620 F.2d 324, 333 (2d Cir.), *cert. denied*, 449 U.S. 834 (1980). Defendant's contention that Brown's statement was inherently unreliable and could not be utilized to establish probable cause inasmuch as it was motivated by his de-

sire to curry favor with the Government is rejected due to the strong corroborating surveillance observations indicating that such statement was in fact truthful. *Compare United States v. Oliver*, 626 F.2d 254, 261 (2d Cir. 1980).

Addressing the warrantless arrest of defendant at his home, the Government has asserted two reasons why such arrest was not violative of *Payton*. First it is contended that *Payton* does not apply when an arrest is made in a doorway rather than totally inside a suspect's home. The Government relies on *United States v. Whitten*, 706 F.2d 1000 (9th Cir. 1983), wherein it was held that *Payton* was not violated where a defendant had been arrested immediately after answering the police officers' knock at the door to such defendant's hotel room. That court explained that a doorway, "unlike the interior of a hotel room, is a public place." 706 F.2d at 1015. However *Whitten* is not binding precedent on this Court and, moreover, it is inconsistent with a decision of the United States Court of Appeals for the Second Circuit, *United States v. Reed*, 572 F.2d 412, *cert. denied sub nom.* Goldsmith *v.* United States, 439 U.S. 913 (1978), wherein, faced with similar facts, the Court found the warrantless arrest to be unconstitutional.[1] The Court explained:

> "Here, we have little difficulty in determining that Reed was arrested in a place in which she was entitled to a reasonable expectation of privacy. Agent Bell testified that he placed Reed under arrest in the living room-dining room part of the apartment after advising her at the door that his purpose was to place her under arrest. Reed testified that the agents 'rushed in' immediately after she pulled the door open and then arrested her. The district court believed that Reed was arrested when she opened the door. No matter which of these versions is the most accurate, Reed's arrest

[1] The Second Circuit Court of Appeals's reasoning regarding the unconstitutional nature of a warrantless arrest at a suspect's home, absent exigent circumstances, was found persuasive by the United States Supreme Court in *Payton, supra.* at 588-589.

> was effected not in a 'public' place but in a place protected by the Fourth Amendment. She was not arrested in the hallway of the apartment building. Nor was she standing on the threshold of her apartment in such a way that she would have been inside the apartment by taking a step backward and 'outside' by taking a step forward. She was not 'as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house.' *United States v. Santana*, *** 427 U.S. [38, 42 (1976)] *** Rather, she was arrested inside her home." *Id.* at 422-423.

The Court further noted that the fact that the defendant therein had opened the door to her apartment in response to the knock of three armed federal agents did not operate "to eradicate her Fourth Amendment privacy interest." *Id.* at 423 n.9.

> "To hold otherwise would be to present occupants with an unfair dilemma, to say the least — either open the door and thereby forfeit cherished privacy interests or refuse to open the door and thereby run the risk of creating the appearance of an 'exigency' sufficient to justify a forcible entry. This would hardly seem fair in situations that present no exigent circumstances in the first place." *Ibid.*

In the case at bar, although defendant's initial opening of the door to the building in which he had his residence was not the

product of police deception[2] or coercion, the government has not attempted to advance the unacceptable argument that Holland *had consented* to Robinson's *entry* of the building for the purposes of arresting him or "securing" the premises. Indeed the heavy burden of establishing genuine consent can not be satisfied where a person merely does not oppose an officer with his gun drawn entering his or her home. *Cf. United States v. Reed, supra*, at 423 n.9. *See also United States v. Johnson, supra* at footnote 2, 626 F.2d at 757 (defendant's "invitation to the agents to enter after the door was opened was hardly voluntary in light of the coercive effect of the weapons brandished by the agents").

Inasmuch as defendant was inside his home when Robinson entered it without permission in order to effectuate the warrantless arrest, I find such arrest to be illegal as violative of *Payton*. As recognized in *United States v. McCool*, 526 F.Supp. 1206, 1208 (M.D.Tenn. 1981), "[t]o uphold warrantless arrests at a person's home whenever law enforcement officers successfully obtain his presence at a door too readily allows subversion of the *Payton* principle."

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[2] Admittedly there was a quantum of deception employed, possibly intentionally, by the government in that it was Robinson, expected by the government to be recognized by Holland as a friend, who appeared by himself outside of the exterior door and visible to one standing within the protection of the locked door. *See United States v. Johnson*, 626 F.2d 753 (9th Cir. 1980), *aff'd on other grounds*, 457 U.S. 537 (1982), wherein a warrantless arrest had been held to have been illegal because the agents, having knocked on the door to Johnson's house, gave fictitious identifications whereupon Johnson opened his door to drawn guns and was arrested. The instant deception, if any was intended — and such intention has not been shown —, consisted of an agent who was a friend of Johnson's but who was present at the door as a "non-friend" gaining entrance due to the mantle or facade of amity. I find this not to rise to the ruse intentionally utilized in Johnson or to have the deleterious effect accorded the Johnson deception. The government's ultization of Robinson as the "point man" rather than another agent is qualitatively the same as the use by the agents in *United States v. Mason*, 661 F.2d 45 (5th Cir. 1982), of the company of Mason's girl friend as they approached Mason's home which probably caused Mason to open his door and stand exposed in the doorway.

The Government has further not argued, nor could the evidence which was presented warrant a finding, that there were exigent circumstances in this case to justify a warrantless arrest of defendant. Holland had no way of knowing that Brown had been arrested many blocks away and therefore had no reason to attempt to flee his home and the area. Indeed had the officers merely "secured" the premises by watching the house while an arrest warrant application was prepared and presented, they could have properly arrested Holland without a warrant if he had attempted to leave the building based upon the existence of probable cause for the felony arrest. It is further noted that when Robinson approached the residence he had no knowledge that Holland possessed additional cocaine or other contraband or that Holland would have had any reason to destroy such evidence if he did in fact possess such. *See United States v. Campbell*, 581 F.2d 22, 25 (2d Cir. 1978).

The Government additionally relies on *United States v. Mason, supra* at footnote 2, wherein that defendant came to the front door of his home and was arrested without a warrant by approaching agents. The court held that the arrest was valid based upon *United States v. Santana, supra*, wherein a suspect was standing in the open doorway of her home as the officers approached her. See 427 U.S. at 40. However it was noted in *Santana* that such defendant "was not merely visible to the public but was as exposed to public view, speech, hearing and touch as if she had been standing completely outside her house." 427 U.S. at 42. In view of the Second Circuit's decision in *United States v. Reed, supra*, and the Fifth Circuit's failure to even mention *Payton* in its opinion, I do not find *United States v. Mason*, to be dispositive or persuasive in the case at bar. As noted in footnote 2, *supra*, Mason "came to the front door" as the agents and Mason's girlfriend approached, opening the door and voluntarily stepping into the doorway thereby exposing himself to a *Santana* type situation. He did not respond to an officer's knock as in *United States v. Reed*

or in the instant action. It is clear, however, in this circuit that a person who opens his door in response to a police officer's knock is still considered to be inside his or her home for the purposes of Fourth Amendment protections and that the mere act of opening a door to one's home in response to a knock or bell does not in of itself lay one open to a warrantless felony arrest absent exigent circumstances. *See United States v. Reed, supra.*

The Government has further contended that *Payton* is inapplicable because defendant was not arrested in his home but in the common stairway or hallway leading to the entrances of the two apartments. It relies on the line of cases in this circuit holding that a common area or hallway in an apartment building, even if usually kept locked, is considered a public place not protected by the Fourth Amendment. *See, e.g., United States v. Moore*, 463 F.Supp. 1266, 1270 (S.D.N.Y. 1979), and cases cited therein.

The Government's position regarding the inapplicability of *Payton* is incorrect for two reasons. First, the building at 137 Arden Lane is not an apartment house in the normal sense and the normally closed and locked door through which Robinson nonconsensually entered to arrest Holland gave access to only two apartments (T 1-36, 1-64 & 1-65). Therefore each of the two tenants exercised considerably more control over access to the vestibule and common stairway leading to their respective living quarters than would be the case in a multi-unit apartment house and could reasonably be said to possess a greater expectation of privacy than would be true of tenants in a large apartment complex. *Accord, United States v. Fluker*, 543 F.2d 709, 716 (9th Cir. 1976). Furthermore, the numerous decisions in this circuit holding that an apartment dweller's Fourth Amendment protections do not extend to a lobby or hallway in the building have consistently taken note of the fact that the arresting or eavesdropping officers entered the building peaceably. In *United States v. Penco*, 612 F.2d 19 (2d Cir. 1979), the Court explained:

"It follows that there was no violation of appellant's consti-

> tutional rights by reason of the presence of the DEA agents in the hallway outside the Duverglas apartment, in the building stairwell, or in its garage, so long as they entered peaceably." 612 F.2d at 25.

See also United States v. Wilkes, 451 F.2d 938 (2d Cir. 1971); *United States v. Llanes*, 398 F.2d 880 (2d Cir. 1968), *cert. denied*, 393 U.S. 1032 (1969); *United States v. Conti*, 361 F.2d 153 (2d Cir. 1966), *vacated on other grounds and case remanded*, 390 U.S. 204 (1968); *United States v. Miguel*, 340 F.2d 812 (2d Cir.), *cert. denied*, 382 U.S. 859 (1965).

In the case at bar Deputy Robinson's entry into the stairwell area to arrest defendant was not preceded by an invitation by either of the building's tenants but was attributable solely to the drawn weapon, flashing badge and unwarranted assertion of legal authority to be in such area to "secure" the premises. Even were I to find (which I do not) that defendant did not possess a reasonable privacy interest in the common area in question, the forceful intrusion into such area to effectuate a warrantless arrest cannot be legitimized by reliance on prior decisions permitting peaceful police entries into apartment building lobbies or hallways in order to effectuate proper arrests or to conduct surveillance operations.

Inasmuch as Robinson's entry into the building and his subsequent arrest of defendant were unlawful, the physical evidence taken from defendant's person cannot properly be classified or offered as evidence obtained pursuant to a lawful arrest and must be suppressed under the exclusionary rule. *See Wong Sun v. United States*, 371 U.S. 471 (1963); *Weeks v. United States*, 232 U.S. 383 (1914). In addition the admissions allegedly made by defendant within two to ten minutes after his arrest (T 1-70, 1-102) to Robinson and the other officers who illegally detained him as well as any later admissions have not been shown to have been freely made by defendant despite Robinson's giving of the *Miranda* warnings following defendant's arrest. The temporal proximity of the illegal

arrest and the admissions is apparent from the testimony given at the suppression hearing and the Government has simply not met its burden of demonstrating the lack of exploitation of the improper arrest. *See Dunaway v. New York*, 442 U.S. 200 (1979); *Brown v. Illinois*, 422 U.S. 590, 604 (1975).

In accordance with the foregoing defendant Holland's motion to suppress the physical evidence seized from his person on February 4, 1983 and the admissions he allegedly made on that date to the arresting officers and other government agents was granted.

Dated: Buffalo, N. Y.
February 24, 1984

_____

U. S. D. J.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

Cr. 83-26
C/A 84-1088

MOSES HOLLAND

A certified copy of the mandate of the United States Court of Appeals for the Second Circuit dated February 8, 1985, having been filed in the office of the Clerk of this court on March 19, 1985, it is hereby,

ORDERED, ADJUDGED AND DECREED that said mandate be, and hereby is, made the judgment of this court.

JOHN T. CURTIN
Chief United States District Judge

Dated: March 21, 1985

United States Court of Appeals

for the

SECOND CIRCUIT **MANDATE**

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of February, one thousand nine hundred and eighty-five.

Present:

HON. HENRY J. FRIENDLY
HON. ELLSWORTH A. VANGRAAFEILAND (SEAL)
HON. JON O. NEWMAN

Circuit Judges,

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

-v.- 84-1088

MOSE HOLLAND,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed in accordance with the opinion of this court.

(SEAL) A TRUE COPY
ELAINE B. GOLDSMITH
(signature)
CLERK

Elaine B. Goldsmith
Clerk
(signature)
Edward J. Guardaro
Deputy Clerk

(2)

Office-Supreme Court, U.S.
FILED
MAY 6 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1598

In the Supreme Court of the United States

OCTOBER TERM, 1984

MOSE HOLLAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
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Department of Justice
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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing an order suppressing evidence and oral admissions following his warrantless arrest.

On March 15, 1983, petitioner was charged in a superseding indictment returned in the United States District Court for the Western District of New York with distribution and possession of a controlled substance (cocaine), in violation of 21 U.S.C. 841(a)(1). Before trial, petitioner moved to suppress the physical evidence seized from his person and the oral admissions that he made following his warrantless arrest on the ground floor entranceway to a common hallway, serving both petitioner's second floor apartment and a separate first floor apartment. On February 24, 1984, the district court suppressed the physical evidence and oral admissions on the ground that petitioner's warrantless arrest was illegal under *Payton* v. *New York*, 445 U.S. 573

(1980), because he was "inside his home" when the arrest took place (Pet. App. A15-A25). The court of appeals reversed in a split decision, concluding that this Court's decision in *Payton* did not broaden the definition of home so as to include the entrance to a common hallway (Pet. App. A1-A14).

Petitioner contends (Pet. 5-12) that the Fourth Amendment prohibits the police from making a warrantless non-exigent arrest of a person at the entrance of the common hallway serving both his apartment and a second apartment. Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court.[1] The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to suppress. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[2]

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[1]It is now over 25 months since the return of the superseding indictment and over 14 months since the district court's suppression order. Further interlocutory review at this time would cause additional delay in the trial of the charges against petitioner.

[2]Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1985

Office - Supreme Court, U.S.
FILED
MAY 15 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1598

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

MOSE HOLLAND,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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May, 1985

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In The

SUPREME COURT OF THE UNITED STATES

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Petitioner,

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ON WRIT OF CERTIORARI
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REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The Supreme Court unquestionably has jurisdiction to review by certiorari any case in a Court of Appeals, 28 U.S.C. §1254(1). Coleman v. Paccar Inc., 424

U.S. 1301, 1303 (1976). While the Court has expressed its disinclination to encourage piecemeal litigation, it will do so when the interlocutory order is fundamental to the further conduct of the case. United States v. General Motors Corporation, 323 U.S. 373, 377 (1945); Land v. Dollar, 330 U.S. 731, 734 (1947).

It is under such circumstances that Petitioner comes to this Court. Charged with the unlawful distribution and possession of cocaine, the order of the Second Circuit denying suppression of that evidence and Petitioner's incriminating admissions relating to it (A-2), invite Petitioner's conviction. Armed with the cocaine secured in Mose Holland's apartment and his admission of possession, the possibility of the Petitioner's acquittal is remote.

The reality of the case is such that the correctness of the Court of Appeals' decision should be reviewed at this juncture, before the Petitioner is subjected to proceedings which incur expense to the Government and expenditure of time and resources to the judiciary. Were the issue raised less significant, the equities might favor review subsequent to trial. However, given the irreconcilable conflict among the circuit courts of appeals as to an individual's expectation of privacy in commonly shared property, the matter should be resolved by the Court promptly. The Government will not be prejudiced by the delay necessitated and the finality of the Second Circuit's determination, insofar as it represents the ultimate appellate ruling on the legality of the evidence secured, mili-

tates in favor of Supreme Court review prior to prosecution.

This Court has given the concept of appellate finality a practical rather than a technical construction. Gillespie v. United States Steel Corporation, 379 U.S. 148, 152 (1964). That approach is properly applicable to this case and should defeat the Government's claim of prematurity.

CONCLUSION

For these reasons, the writ of certiorari should be granted.

Respectfully submitted,

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May, 1985